

Before the  
Federal Communications Commission  
Washington, D.C. 20554

CC Docket No. 92-91

In the Matter of

Open Network Architecture Tariffs  
of Bell Operating Companies

**ORDER**

Adopted: January 26, 1995; Released: February 14, 1995

By the Commission:

**I. INTRODUCTION**

1. Before the Commission are two petitions filed by MCI Telecommunications Corporation (MCI), requesting reconsideration of two related Commission orders resolving an investigation of the initial Open Network Architecture (ONA) tariffs filed by six of the Bell Operating Companies (BOCs).<sup>1</sup> In the *ONA Investigation Final Order*, the Commission determined that the BOCs' initial ONA rates were unlawful, directed them to file replacement rates based upon altered ratemaking methodologies, and terminated the investigation except with respect to US West.<sup>2</sup> In the companion *SCIS Disclosure Review Order*,<sup>3</sup> the Commission denied MCI's application for review of procedures adopted by the Common Carrier Bureau in the *SCIS Disclosure Order*<sup>4</sup> to provide intervenors access under nondisclosure agreements to proprietary cost support, the software used

to create it, and related materials.<sup>5</sup> MCI's central contention in each petition is that these procedures denied it meaningful participation in the investigation. For the reasons explained below, we deny both petitions.

**II. BACKGROUND**

2. Implementation of Open Network Architecture required that existing feature group access arrangements be unbundled, and that new access charge subelements, known as basic service elements (BSEs) and basic serving arrangements (BSAs), be established pursuant to the Commission's decision in the *Part 69 ONA Order*.<sup>6</sup> That order required carriers to submit engineering studies, time and wage studies, or other cost accounting studies to identify direct costs, and to provide: (1) a projection of costs for a representative 12-month period; (2) estimates of the effect of the service on the carrier's traffic and revenues, including the traffic and revenues of other services; and (3) supporting workpapers for estimates of costs, traffic, and revenues.<sup>7</sup> Carriers used proprietary engineering models to develop the specific costs associated with providing particular BSEs. This was necessary because a reasonable, internally consistent allocation of switching component costs among the multiple BSEs that individual components support requires recognition of the extent to which each BSE consumes a specific component's capacity. The component resources used to provide individual BSEs in turn reflect the proprietary design and performance characteristics of individual switch technologies.<sup>8</sup>

3. While the rules that govern review of tariffs filed by dominant carriers generally require public access to cost support material, in the unique circumstances posed by ONA implementation the Commission balanced the need for public access with the competing interests of carriers and switch vendors in protecting confidential financial materials. The unrestricted disclosure in this proceeding of cost support that includes switch vendors' proprietary material would almost certainly have terminated the vendors' provision to Bell Communications Research, Inc.

<sup>1</sup> MCI filed both these petitions on January 14, 1994. On January 27, 1994, Sprint Communications Company, L.P. (Sprint) filed comments supporting MCI's SCIS-related petition, and Allnet Communications Services, Inc. (Allnet) filed comments supporting both of MCI's petitions. On the same date the Ameritech Operating Companies (Ameritech), New England Telephone and Telegraph Company and New York Telephone Company (NYNEX), Southwestern Bell Telephone Company (SWBT), filed oppositions to the SCIS-related petition, seeking its dismissal; the same three BOCs filed separate oppositions to the merits of MCI's *ONA Investigation Final Order* petition. BellSouth Telecommunications, Inc. (BellSouth) filed oppositions to both MCI petitions. US WEST Communications, Inc. (US WEST) the same day filed a motion to dismiss the SCIS-related petition, and a separate opposition to the *ONA Investigation Final Order* petition. MCI replied to these oppositions in separate replies filed February 8, 1994.

<sup>2</sup> Open Network Architecture Tariffs of Bell Operating Companies, Order Terminating Investigation, CC Docket No. 92-91, 9 FCC Rcd 440 (1993) (*ONA Investigation Final Order*).

<sup>3</sup> Commission Requirements for Cost Support Material to be Filed with Open Network Architecture Access Tariffs, 9 FCC Rcd 180 (1993) (*SCIS Disclosure Review Order*). This Order is referred to in the *ONA Investigation Final Order* as the *SCIS Disclosure Reconsideration Order*.

<sup>4</sup> Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs, 7 FCC

Rcd 1526 (Com. Car. Bur. 1992) (*SCIS Disclosure Order*).

<sup>5</sup> We refer to these proprietary software models by the acronym SCIS, which refers to the Bellcore-developed Switching Cost Information System. US WEST originally used SCIS to develop cost support only for some of its BSEs, and used its own proprietary model for the cost support for its other BSEs. Because the US West tariffs were found unlawful, US West has since refiled its proprietary cost model. The issues raised by MCI's petitions are limited in scope to the investigative treatment of the SCIS model and related materials.

<sup>6</sup> Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, CC Docket No. 89-79, Report and Order, Order on Reconsideration, and Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 4524 (1991) (*Part 69 ONA Order*), modified on recon. 7 FCC Rcd 5235 (1992), further modified on recon., 8 FCC Rcd 3114 (1993).

<sup>7</sup> *Part 69 ONA Order*, 6 FCC Rcd at 4531 (para. 42). Cost support requirements were further specified in Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs, 6 FCC Rcd 5682 (Com. Car. Bur. 1991).

<sup>8</sup> A summary of the considerations justifying carriers' use of proprietary cost support materials in the ONA investigation appears in the *ONA Investigation Final Order*, 9 FCC Rcd at 469-471 (paras. 78-83), and a more detailed analysis is in the *SCIS Disclosure Order*, 7 FCC Rcd at 1535-36 (paras. 52-56).

(Bellcore) and US West of proprietary data needed to develop and update the engineering models used to allocate costs.<sup>9</sup> Current vendor data is needed both to assure the analytic integrity of the software model's design, and the accuracy of data the model refers to when performing investment studies. Accordingly, the Commission determined to develop procedures that would enable the maximum public access consistent with assuring the continued participation of switch vendors in the cost modeling process.

4. As an initial step, Bureau staff reviewed *in camera* the complete, unredacted software and related data used by Ameritech, which was the first carrier to submit its ONA tariff filing, both to determine whether these materials were exempt from mandatory disclosure under the Freedom of Information Act (FOIA) and to develop a better understanding of the role played by SCIS in the overall ONA ratemaking process. In the *SCIS In Camera Order*, the Bureau determined that SCIS and related materials were exempt from mandatory disclosure under the FOIA, and ordered all BOCs other than Ameritech to submit unredacted software for *in camera* examination by Bureau staff. In the subsequent *ONA Designation Order*, the Bureau designated investigation issues for all BOCs, including several focused on the use of software models.<sup>10</sup> Because the issues involving the validity and behavior of software models used to calculate investment associated with specific BSEs required review both of proprietary software and the design and performance information supplied by switch vendors, these issues necessitated development of a protected disclosure procedure to enable participation by intervenors.

5. When the BOCs, Bellcore, intervenor parties and switch vendors were unable to agree upon a method for inspection of the confidential portions of the cost support exhibits, the *SCIS Disclosure Order* specified procedures for redaction of these materials, including the types of material to be protected; ordered that the redacted versions be provided to intervenors; and required carriers to retain an independent auditor to review the cost models and other aspects of their ratemaking processes. The initial response by Bellcore to those instructions was unsatisfactory and further informal negotiations between Commission staff, the BOCs, Bellcore and switch vendors led to the development of a second edition of redacted software, referred to as "Redaction II."<sup>11</sup> MCI and other intervenors who signed a nondisclosure agreement were permitted to work with this redacted software at Bellcore and US West premises,<sup>12</sup> and to observe firsthand the variation in software model outputs generated by changes in inputs.

6. At the same time, the independent auditor retained by the BOCs, Arthur Andersen and Company, undertook an extensive review of the software model's internal validity and the sensitivity of its results to alterations in specified data inputs — i.e., how changes in data put into the model

affect the investment data generated by the model.<sup>13</sup> The specifications for this review were provided informally by Bureau staff to Bellcore, carrier representatives, and the auditor, and then confirmed by the auditor in writing.<sup>14</sup> The resulting report was submitted to Bureau staff with sensitive material included, and a redacted version of that report was then given to intervenors, who were afforded an opportunity to submit additional questions to the auditor based on their examination of the report.

### III. SUMMARY OF MCI PLEADINGS

7. In essence, MCI contends in both its petitions that the procedures described above were insufficient to afford it meaningful participation in the investigation. In its petition addressing the *ONA Investigation Final Order*, MCI generally recites its past objections to computerized cost models and claims that the redacted versions of SCIS software were not useful. MCI Petition (*ONA Investigation Final Order*) at 2. MCI asserts that, because of inadequate disclosure procedures, the intervenors were unable to perform necessary sensitivity analyses and were prevented from raising the issues such analyses would have suggested. *Id.* at 3-6. MCI argues that the resulting ratemaking violates Sections 201-205 of the Communications Act, as well as the Administrative Procedure Act and constitutional due process. MCI Petition (*ONA Investigation Final Order*) at 6-7. MCI says that the Commission failed to explain why SCIS deserves "special protection" in this proceeding compared to the access provided in state proceedings. MCI Petition (*SCIS Disclosure Review*) at 2-4.

8. MCI also contends that, by focussing narrowly on the Redaction II software, the *SCIS Disclosure Review Order* glosses over other impediments to intervenor participation, including: (a) the application of the Model Nondisclosure Agreement (MNA) to all competitively sensitive information other than SCIS; (b) the restricted number of experts allowed access to sensitive materials; (c) copying provisions; and (d) scope of communication between intervenors. MCI states that the Commission has failed to justify restricting access to materials other than software models, such as the Andersen reports, that contain no technology-specific proprietary data. MCI Petition (*SCIS Disclosure Review*) at 4-7. Finally, MCI contends that the *SCIS Disclosure Review Order* mischaracterized the position it took in its application for review about the copying restrictions in the MNA. *Id.* at 8.

### IV. COMMENTS AND OPPOSITIONS

9. In comments supporting both MCI petitions, Allnet states there was no reason for requiring any party to enter into non-disclosure agreements to view redacted software materials from which confidential information had been redacted, and that the redacted information itself should

<sup>9</sup> *SCIS Disclosure Order*, 7 FCC Rcd at 1529 (paras. 17-19).

<sup>10</sup> Open Network Architecture Tariffs of Bell Operating Companies, CC Docket No. 92-91, 7 FCC Rcd 2604 (Com. Car. Bur. 1992) (*ONA Designation Order*).

<sup>11</sup> The first edition of redacted software is referred to as "Redaction I." (Changes developed between Redaction I and Redaction II, as well as necessary limits on intervenor access to some aspects of SCIS inputs, are described in the *SCIS Disclosure Review Order*, 9 FCC Rcd at 181 (paras. 6-7).)

<sup>12</sup> US WEST's initial ONA rates were developed from cost

studies based on the SCIS model and on cost studies that used the Switching Cost Model (SCM) developed by US WEST.

<sup>13</sup> For example, by varying the cost of money and running a new study on that basis, the investment figures for specific BSEs that SCIS generates will change to reflect the changing cost-of-money assumption.

<sup>14</sup> Letter from James E. Farmer, Arthur Andersen & Co., to Richard M. Firestone, Chief, Common Carrier Bureau, March 5, 1992 (*March 5 Letter*).

have been made available to parties that signed a non-disclosure agreement. Allnet contends that the private conversations between the BOCs and the FCC violate the APA and the Communications Act. Allnet Comments at 1-2. Sprint asserts, in comments supporting MCI's *ONA Investigation Final Order* petition, that "secret ratemaking" prevented interested parties from evaluating the BOCs' ratemaking process; that the protective arrangements adopted in the *ONA* investigation go beyond past Commission practice; and that the investigation should be reopened in a manner permitting "meaningful participation" by intervenors. Sprint Comments (*ONA Investigation Final Order*) at 1-3. Sprint separately supports the second MCI petition, asserting the Commission misread or overlooked substantial portions of MCI's original application for review of the *SCIS Disclosure Order*, and has not explained its decision to, e.g., prohibit interaction between intervenors on redacted Andersen reports. Sprint Comments (*SCIS Disclosure Review*) at 1-2.

10. The BOCs state that MCI's SCIS-related petition should be summarily dismissed for failing to raise new facts or changed circumstances as required by Section 1.106 of the Commission's Rules. See, e.g., Ameritech Opposition (*SCIS Disclosure Review*) at 1-2. In separate oppositions to MCI's *ONA Investigation Final Order* petition, they also contend that MCI has had substantial opportunity to review and comment on both *ONA* rates and methodology. See, e.g., Ameritech Opposition (*ONA Investigation Final Order*) at 1-3.

11. US WEST states that the *ONA Investigation Final Order* petition fails to request cognizable relief, and is grounded on conclusions unsubstantiated by facts other than the "undeniable" limitation of MCI's access to confidential information. US WEST Opposition (*ONA Investigation Final Order*) at 1-3.<sup>15</sup>

## V. DISCUSSION

12. As a threshold matter, we deny US WEST's motion to dismiss MCI's petition of the *SCIS Disclosure Review Order* because it raises no new facts or changed circumstances and is thus defective under Section 1.106 of our Rules, 47 C.F.R. § 1.106. The determinations made in the *SCIS Disclosure Review Order* address the threshold question whether Bureau procedures for providing public access to proprietary cost support enabled development of a public record adequate to justify the decision reached in the investigation. The Order thus resolves procedural issues that underlie the substantive decisions made in the *ONA Investigation Final Order*. Treating MCI's petitions directed at the two orders as conceptually distinct would fail to recognize this linkage between the orders. Therefore, although many of MCI's arguments are in fact similar to those it made in its application for review of the Bureau's *SCIS Disclosure Order*, we deny US WEST's motion in the interest of a full and comprehensive consideration of MCI's contentions regarding the final outcome of the *ONA* tariff investigation.

13. *General.* We begin by acknowledging the importance of the public policies cited by MCI. FOIA reflects a strong commitment to the widespread availability of government

records, subject, however, to several important exceptions. The Administrative Procedure Act and the Due Process Clause of the Constitution generally entitle parties in administrative proceedings to have access to the documents necessary for effective participation in those proceedings. We are confident that our determination in the Orders MCI seeks to have reconsidered did not violate these precepts.

14. As explained in the *SCIS Disclosure Review Order*, the Commission accorded full weight both to the intervenors' interests in examining cost support information in the *ONA* tariff investigation, and to the switch vendors' interests in protecting proprietary information. Following the initial, *in camera* review of confidential cost support conducted by Commission staff, the *SCIS Disclosure Order* required the BOCs to prepare a redacted version of the SCIS software and associated documentation to enable intervenors to participate as fully as possible in the investigation. The redaction process went through two successive editions, and intervenors also had access to the redacted version of the independent auditor's report.<sup>16</sup> MCI and other intervenors were accorded adequate opportunity to participate in this investigation by these procedures, and raised several specific questions regarding the reasonableness of SCIS investment studies. See para. 19, *infra*. MCI states in its Reply on the *ONA Investigation Final Order*, at 3 n.6, that one of its staff experts was able to view more of SCIS in two state proceedings than permitted by the Commission in this proceeding. Even if true, state proceedings do not govern federal procedures; the Commission must reach its own determination of the relative weight to be accorded the need for disclosure and the need to protect confidentiality, under applicable federal statutes and regulations. These criteria are summarized and implemented in the *SCIS Disclosure Order*, 7 FCC Rcd at 1531 (paras. 28-29).

15. The Commission did believe it necessary to restrict public participation in the tariff review process in the circumstances of this case to protect confidential financial information. As noted in para. 3, *supra*, disclosure of proprietary materials would jeopardize access to vendor-provided data and thus call into question the continued validity of the investment models and the Commission's ability to review BSE rates for a reasonable, consistent relationship to underlying costs. The limitation on public access was, however, explicitly limited to the unique circumstances posed by the *ONA* investigation.<sup>17</sup>

16. *Intervenor Access to Redacted Materials.* MCI's contentions directed at the *SCIS Disclosure Review Order* limiting intervenor access to redacted materials, and more generally directed toward restrictions on intervenor participation, are stated in conclusory terms and raise no factual or legal considerations not already raised and considered in the *SCIS Disclosure Review Order* and *ONA Investigation Final Order*. The *SCIS Disclosure Order* did not consider the application of the Model Nondisclosure Agreement (MNA) to proprietary materials other than those related to SCIS review, and MCI's application for review did not raise the issue of MNA treatment of other than SCIS-related materials. The focus of the *SCIS Disclosure Review Order* on MNA treatment of the redacted SCIS software relates

<sup>15</sup> US WEST's motion to dismiss MCI's SCIS-related petition is considered at paragraph 12, *infra*.

<sup>16</sup> *SCIS Disclosure Review Order*, 9 FCC Rcd at 180 (para. 3).

<sup>17</sup> (para. 9).

<sup>17</sup> *ONA Investigation Final Order*, 9 FCC Rcd at 469 n.163.

directly to the concerns expressed in MCI's application for review. MCI has merely asserted that this focus was not a "rational response" to MCI's arguments. As for MCI's specific concerns about the "one attorney, two experts" restriction, copying restrictions, and restrictions on intervenor communications, each of these issues is fully addressed in the *SCIS Disclosure Review Order*. We need not address MCI's contentions again here.

17. *Sensitivity Analyses and Intervenors' Questions.* MCI contends that it could not perform any sensitivity analyses even using Redaction II, and thus was prevented from meaningful participation in the tariff investigation. MCI Petition (*ONA Investigation Final Order*) at 3-5. We disagree. Redaction II allowed intervenors to participate in a useful manner in the ONA investigation because Redaction II software permitted intervenors to observe the SCIS model's functioning and its specific responsiveness to altered inputs, including, e.g., percentage fill of lines, projected schedule for switch exhaustion, and cost of money. This expectation was confirmed by Bureau staff, who had full access to the redacted software. Redaction II enabled each intervenor to interact with the SCIS software used to develop the costs associated with using a particular type of switch technology to provide specific BSEs. In contrast with the initial redaction, however, the second redaction relied on actual vendor data and included, for each BOC, model offices (paradigms developed from the characteristics of actual BOC offices) that accurately reflected the particular carrier's reliance on a specific switch vendor's technology as a basis for developing ONA rates. The second redaction also included, for each BOC, the several specific version(s) of SCIS used.<sup>18</sup> This enabled intervenors to isolate and quantify the discrete effect on SCIS cost studies of using a more or less recent version of the software, as well as several different input variables.<sup>19</sup> While intervenors were not provided the range of SCIS investment variables for specific switch types in those instances for which disclosing such data would compromise confidential materials, the intervenors were able to select hypothetical values for such ranges and observe the quantitative effect of altering the values set for those variables, as well as to vary the other SCIS inputs for which the range of actual values was disclosed.

18. In its only effort to substantiate its assertion that sensitivity analyses were not possible MCI stated that, if it did not see actual input values, a BOC could develop almost any cost it wanted through SCIS, without being

reviewable by intervenors. MCI Petition (*ONA Investigation Final Order*) at 4. The range of permissible values for some SCIS inputs was not disclosed at switch vendors' request, but the redacted software did generally permit intervenors to supply different values for these inputs and to quantify the extent to which such changes affected the model's outputs. While intervenors thus could not discover the specific design, cost or performance attributes implicitly disclosed by the range of values for a particular input, they were nevertheless able to change hypothetical values and observe the effect on outputs (i.e., unit investment data for BSEs), and so determine whether particular variables had the potential to significantly affect investment studies. The only input variables excluded from this procedure were negotiated switch price discounts and right-to-use costs; intervenors were not permitted to vary those values, in order to eliminate the chance of discovering proprietary switch price information.<sup>20</sup> The access provided to MCI and other intervenors thus permitted a valid review of the model's sensitivity to changes in various inputs, while protecting switch vendors' sensitive competitive data from public disclosure.

19. Parties were able to raise specific questions on cost and rate development on the basis of sensitivity analyses, despite MCI's protests to the contrary. Although intervenors were not provided full access to all data and software, the redacted software provided intervenors did enable the analysis cited in the *ONA Investigation Final Order*, and so allowed intervenors to raise specific, meaningful questions to the auditor.<sup>21</sup> For example, the intervenors sought a comparison of investment study results generated by different editions of SCIS, and this request was referred to Andersen for sensitivity analysis. The *ONA Investigation Final Order* requires BOCs using SCIS to rely on the most current version of SCIS available, or explain its use of an older version.<sup>22</sup>

20. The scope of SCIS disclosure ultimately accorded intervenors by Redaction II reflected the Bureau's prior, *in camera* review of the SCIS software to determine the extent to which SCIS investment study results could be manipulated by BOC staff operating the model. In addition to determining which variables could significantly alter SCIS investment study results, the *in camera* review of the unredacted SCIS software disclosed in detail the internal relationships between sensitive vendor data and the operating software, so that different approaches to redaction that would potentially compromise proprietary data could be

<sup>18</sup> As explained in the *ONA Investigation Final Order*, SCIS is periodically updated to reflect changes in switch design, cost, and performance, including the replacement by vendors of generic software used to operate the switch. Such changes may affect the investment data generated by a SCIS study. For example, for the SESS switch, intervenors had a total of seven versions of SCIS from which to run version-specific sensitivity analyses.

<sup>19</sup> MCI refers generally to "user inputs," which we understand to mean the factual assumptions and methodological options that SCIS requires the operator to choose among. See para. 6, *supra*. As the analysis in the *SCIS Disclosure Order* makes clear, however, different input parameters involve different tradeoffs between public access and the risk of disclosing proprietary materials. That Order specifically required that BOC input parameters be disclosed to parties signing the nondisclosure agreement, excepting only inputs "that allow the extraction of data that is competitively sensitive to switch vendors." SCIS Disclosure Order, 7 FCC Rcd at 1536-37 (paras. 58-59). Con-

sequently, the range of analog or digital lines or trunks that could be terminated on a specific switch, for example, was not disclosed. The only other input ranges not disclosed were switching module memory adjustment, the right-to-use dollars per switching module, and the coefficient of variation.

<sup>20</sup> *SCIS Disclosure Review Order*, 9 FCC Rcd at 181 n.16.

<sup>21</sup> Questions referred to the auditor, and supplemental sensitivity analyses requested by the Bureau, were addressed in the auditor's supplemental report of December 23, 1992. Questions were referred to Andersen in a letter sent December 9, 1992 from Chief, Tariff Division, FCC, to Joseph P. Perrone. That letter was also sent to intervenors and is included in the docket as an attachment to Perrone's responsive letter of December 23, 1992 submitting Andersen's supplemental report. The actual analyses involve proprietary materials and were furnished to intervenors subject to nondisclosure agreements.

<sup>22</sup> *ONA Investigation Final Order*, 9 FCC Rcd at 449-50 (para. 21).

compared. Such review was necessary for the Bureau to responsibly oversee the continued negotiations between vendors, Bellcore and the BOCs toward developing Redaction II.

21. After reviewing Ameritech's proprietary materials and determining that all such models and related, sensitive data were exempt from disclosure under FOIA, the Common Carrier Bureau in the *SCIS Disclosure Order* rejected the initial Bellcore disclosure proposal. That proposal would not have included any proprietary vendor data, even in the report submitted to the Commission under seal. The Bureau therefore developed an alternative method that identified the "major [model] elements at issue [when seeking a balanced, useful level of disclosure] -- switch vendor inputs; BOC inputs; the operational SCIS software, and documentation of its processing algorithms; and SCIS output reports."<sup>23</sup>

22. Redaction II thus reflected disclosure consistent with the considerations stated in the *SCIS Disclosure Order*, and gave intervenors access to the SCIS software and related materials on as broad a basis as possible without disclosing proprietary materials. The Redaction II procedures, for reasons explained in the *SCIS Disclosure Review Order*, necessarily did not enable intervenors to examine all raw input data from switch vendors, to compare the impact of different switch types on specific BSE rates, or to reconstruct the entire range of BOC assumptions at every stage of the rate development process.<sup>24</sup> Nevertheless, the level of review provided by intervenors, buttressed by the independent auditor's report and full staff review of the cost support materials, adequately led to full review of the proposed rates and adequate participation by the public. MCI's arguments respecting sensitivity analyses, therefore, raise no new factual or legal considerations warranting reconsideration of the orders resolving the ONA rate investigation.

23. *Adequacy of Arthur Andersen and Company's Independent Audit.* MCI challenges the characterization of the Andersen review as an "audit" by Ameritech and NYNEX. MCI states that despite the Bureau's unambiguous directive that an "independent audit" be conducted, it was eventually scaled back to an "independent review" over the protests of intervenors. MCI adds that even Andersen is unwilling to characterize its limited review as an "audit." MCI Reply (*ONA Investigation Final Order*) at 3-4.

24. The *SCIS Disclosure Order* did initially characterize the independent examination of cost models required to be undertaken by an outside auditing firm as an "independent

audit."<sup>25</sup> The Commission's main concerns were already focused at that juncture on the internal validity and functioning of the proprietary cost models the BOCs used in developing ONA rates, as well as BOC inputs to the model and post-SCIS cost study procedures. Subsequent staff discussions with representatives of Arthur Andersen seeking to develop a detailed specification of the review clarified, however, that the contemplated study was not an "audit" as that term is used in the financial community. The letter transmitting Andersen's proposed eight-page specification of work, which refers to an "independent review" of the cost models, was submitted to the Bureau on March 5, 1992. The work specification makes the scope of Andersen's undertaking clear. By whatever term it was characterized, the focus of the Commission's concern and of the corresponding independent review remained consistent, and focused on the issues we identified as relevant to a determination of the lawfulness of ONA rates.<sup>26</sup>

25. *Independent Staff Review.* MCI argues that the Commission staff review of models submitted *in camera* was not comprehensive, because the *SCIS In Camera Order*<sup>27</sup> only required each BOC to submit software for one study area. MCI also states that, while the Commission identified four areas of review undertaken by staff, described in footnotes to paragraph 82 of the *ONA Investigation Final Order*, MCI cannot find any evidence that the staff review considered proprietary materials independently from reviewing the Andersen report. MCI Reply (*ONA Investigation Final Order*) at 4-5.

26. MCI is incorrect that the *SCIS In Camera Order* required submission only of data for a single study area. That order required submission of the software for a single study area, but also required carriers to submit input and output data for all study areas, so that staff could examine BOC procedures at the study area level. The effect of inputting various, alternative data assumptions for individual study areas or altering the carrier's choice of other inputs to SCIS can be adequately examined with a single copy of the software, because the model's internal functions are not altered by the number of studies performed. Thus, the availability of multiple copies of SCIS software would not add to an understanding of the model's functioning, or the extent and effect of carriers' flexibility when using the model.

27. Moreover, the staff did undertake an independent analysis of SCIS software and its application by the BOCs. Prior to the *SCIS Disclosure Order* and consequent Andersen review, Common Carrier Bureau staff independent-

<sup>23</sup> *SCIS Disclosure Order*, 7 FCC Rcd at 1534 (para. 41).

<sup>24</sup> See *SCIS Disclosure Review Order*, 9 FCC Rcd at 181 (paras. 6-7), 182-83 (12-13); *ONA Investigation Final Order*, 9 FCC Rcd at 469-70 (paras. 79-80). The elements of the successive redactions are itemized in a July 13, 1992 *ex parte* communication from James F. Britt, Bellcore, to the Secretary, FCC. See also *Allnet Communications Services*, FOIA Control No. 92-266, 7 FCC Rcd 6329 (1992), upheld *Allnet Communications Services, Inc. v. FCC*, 800 F. Supp. 984 (D.D.C. 1992) (*Allnet v. FCC*). While focussed on FOIA exemption issues, this order equally considers the specific risks raised by discretionary disclosure of proprietary vendor data, as noted in the *ONA Investigation Final Order*, 9 FCC Rcd at 469 (para. 78).

<sup>25</sup> *SCIS Disclosure Order*, 7 FCC Rcd at 1536 (para. 56), 1538 (para. 66).

<sup>26</sup> An informal briefing session was held at Bellcore's Washington offices May 13, 1992 at which Andersen explained the scope

and substance of its review and the schedule for submission of both unredacted and redacted reports. MCI representatives attended that session, and thus were fully aware of the scope of the Andersen review. MCI also suggested specific revisions to the Andersen report methodology. See letter from Larry A. Blosser, MCI to James E. Farmer, Arthur Andersen, May 22, 1992. While Andersen adopted certain of MCI's suggestions in its report, such as the visual method used to identify redacted materials, other suggestions were not followed. These suggestions, such as identifying the party requesting individual redactions, or detailing the effect of vendors' pricing discounts on BSE rates, were either unnecessary or raised the concern about inadvertent disclosure of proprietary information.

<sup>27</sup> Commission Requirements for Cost Support Materials To Be Filed With Open Network Architecture Tariffs, 7 FCC Rcd 521 (1991) (*SCIS In Camera Order*).

ly quantified the effects of all SCIS user inputs on SCIS outputs. These analyses were performed using the same SCIS models, containing all data and assumptions used by the BOCs in developing their ONA rates. Consequently, the results were based on information proprietary to switch vendors, e.g., switch component prices, LEC-specific vendor discounts and right to use software fees. Further, outputs for each BSE were specific to a particular switch technology. These analyses also were based on actual configurations of BOC end offices. The emphasis of staff analyses was on identifying all user inputs that produced changes in outputs, and on quantifying the degree of sensitivity exhibited by individual variables. These analyses were performed for all BOCs and the results were compared. The staff review thus extended to the variables mentioned in paragraph 82 of the *ONA Investigation Final Order*,<sup>28</sup> and the results of that review were consistent with subsequent Andersen analyses for studies the auditor performed using the same assumptions. Based on this initial, independent staff analysis of SCIS and related BOC ratemaking procedures, the staff directed Andersen to perform a series of complex tasks, which when completed, were expected to, and did, verify the staff analyses.

28. At the outset of the ONA investigation, the Bureau explained that it would not rely exclusively on the Arthur Anderson analysis, but rather would use it as a supplement to its own review.<sup>29</sup> The Bureau staff analyzed the SCIS outputs in order to determine why some outputs differed for the various switch types used in ONA ratemaking. While these analyses helped the Commission to understand the sources of rate disparities between BOCs providing similar BSEs, the information contained in the reports was the type of information considered extremely sensitive by vendors. Because of the sensitive nature of the specific analyses performed by staff, release to the public was not appropriate. We have previously considered and rejected allegations that non-disclosed Bureau analysis of SCIS did not permit intervenors an adequate opportunity for review of the carriers' ratemaking methodologies.<sup>30</sup> MCI has not offered any new argument which provides sufficient cause to revisit this issue.

29. MCI also complains there is no indication that Commission staff reviewed two other cost models: the CCSCIS model used by Ameritech to develop costs for one BSE (Remote Activation of Message Waiting-Expanded element) and the pre-1987 version of SCIS employed by US WEST. No independent review of CCSCIS was undertaken by staff, or required of Andersen. In its discretion the Commission decided that, given its limited resources, the burden of conducting a comparable review of a single BOC's isolated use of CCSCIS to develop costs for a single BSE outweighed any potential harm from the rate level for

this BSE. In light of price structure and service description variations between BOCs that made direct BSE-to-BSE rate comparisons problematic, the Commission sought to understand and quantify the several sources of the broad variations in rates between carriers, rather than to evaluate each step in an individual carrier's development of particular BSE rates in detail. This is evident both in the scope of the Andersen work specification (*March 5 Letter, supra*) and in the issues originally designated for investigation.<sup>31</sup> A methodological review of the CCSCIS model would not have contributed significantly to our understanding of the importance of cost models as a source of ONA rate variations.

30. As to US WEST's reliance on pre-1987 SCIS software, the *SCIS In Camera Order* did state that US WEST did not rely on SCIS, a statement based on the original support materials provided by that carrier.<sup>32</sup> The *ONA Investigation Final Order*, however, describes US WEST's failure to file pre-1987 SCIS software it had used, or to report accurately what software it had used to develop costs.<sup>33</sup> Because the US WEST case was found fundamentally flawed by its reliance on two outdated and practically irreconcilable cost models, and US WEST indicated its intention to develop subsequent rates on the basis of an updated and expanded SCM model, it was neither necessary nor desirable to require the expense and administrative burden of a separate, detailed review of the incomplete SCM software.

31. As to BellSouth's use of its non-SCIS procedure to develop a model office as a basis for calculations, MCI claims that Andersen did not fully review the methodology, but only reviewed BellSouth's explanation. The review of BellSouth's method by Commission staff and the independent auditor, and the staff's *in camera* comparison of investment results generated by the BellSouth and SCIS model office procedures, establish the carrier's methodology as a reasonable alternative to reliance on SCIS. The supplemental Andersen Report also includes a determination that BellSouth's exhibit, submitted *in camera* to Andersen and the Commission, demonstrates that the alternative approach generates results that differ only negligibly from those expected under SCIS.<sup>34</sup>

32. *FOIA Standard / Balancing Process.* MCI contends that, with regard to disclosure of SCIS materials, confidentiality interests recognized by FOIA exemptions must be balanced against the interest in enabling interested persons to participate fully in Section 204 investigations. MCI asserts that the Commission did not adequately explain its process of balancing disclosure and confidentiality interests. MCI Reply (*ONA Investigation Final Order*) at 6.

<sup>28</sup> That paragraph specifically refers to the effects on SCIS outputs of model office development procedure, noncurrent SCIS models and traffic data, average or marginal SCIS studies, and embedded or prospective technology mixes. Other user inputs examined by staff include, but were not limited to, cost of money, schedules for switch replacement, and switch capacity utilized at installation and at replacement. Staff analyses of SCIS addressed not only the input variables, e.g., an average versus a marginal cost study, and their effects on the costs of a unit of the automatic number identification (ANI) BSE, but more importantly whether the variables selected were consistent with the Commission's ratemaking principles. (ANI identifies the telephone number to which a telephone call should be billed.

See Ameritech Operating Companies, Revisions to Tariff F.C.C. No. 2, 7 FCC Rcd 257, 259 n.24 (Com. Car. Bur. 1991).

<sup>29</sup> *SCIS Disclosure Order*, 7 FCC Rcd at 1536 (para. 56).

<sup>30</sup> See *ONA Investigation Final Order*, 9 FCC Rcd at 467-71 (paras. 75-83); *SCIS Disclosure Review Order*, 9 FCC Rcd at 183 (para. 14).

<sup>31</sup> Open Network Architecture Tariffs of Bell Operating Companies, Order Designating Issues for Investigation, CC Docket No. 92-91, 7 FCC Rcd 2604 (1992).

<sup>32</sup> *SCIS In Camera Order*, 7 FCC Rcd at 521 n.4.

<sup>33</sup> *ONA Investigation Final Order*, 9 FCC Rcd at 461 n.113. c

<sup>34</sup> See *ONA Investigation Final Order*, 9 FCC Rcd at 448 (para. 17).

33. This balancing, however, is described at length in the *SCIS Disclosure Order*.<sup>35</sup> We also note that the issue of whether the Commission struck the correct balance in refusing to release the entire SCIS model and inputs pursuant to a request for disclosure submitted under the FOIA has already been decided by the courts in the Commission's favor.<sup>36</sup> MCI's argument only repeats contentions already completely addressed in the *SCIS Disclosure Order*.

34. *Use of Confidential Material*. Finally, MCI claims that, by not placing the entire SCIS model in the record, and by relying in part on proprietary data that were not included in the record, the Commission's actions in the ONA investigation were arbitrary and capricious.<sup>37</sup> MCI also cites several cases for the general proposition that Federal agencies should base their decisions on information in the record, both to facilitate judicial review and to help ensure complete debate on relevant issues.<sup>38</sup> MCI Reply (*ONA Investigation Final Order*) at 7-8. However, the cases on which MCI relies are distinguishable from the ONA investigation. In each instance, the agency decision failed to withstand judicial review because agency analysis used as a basis for decision had either not been presented to the public for comment or had been released after the pleading cycle was closed.<sup>39</sup>

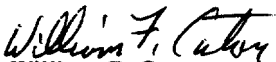
#### VI. CONCLUSION AND ORDERING CLAUSES

35. The contentions raised by MCI raise no factual or legal considerations not previously considered in the Commission's ONA decisions. Nor are we persuaded that the various measures initially adopted by the Bureau on delegated authority, and subsequently upheld by the Commission, have unreasonably limited public participation in the ONA investigation, in light of the circumstances of that proceeding.

36. Accordingly, IT IS ORDERED, that the petitions for reconsideration of the *ONA Investigation Final Order* and the *SCIS Disclosure Review Order*, filed January 14, 1994 by MCI Telecommunications Corporation, ARE DENIED.

37. IT IS FURTHER ORDERED, that the motion to dismiss MCI's petition for reconsideration of the *SCIS Disclosure Review Order*, filed by US WEST Communications, Inc., IS DENIED.

#### FEDERAL COMMUNICATIONS COMMISSION

  
William F. Caton  
Secretary

<sup>35</sup> See *SCIS Disclosure Order*, 7 FCC Rcd at 1531-33.

<sup>36</sup> See *Allnet v. FCC*, 800 F. Supp. at 988-90.

<sup>37</sup> MCI Reply (*SCIS Disclosure Review*) at 7-8.

<sup>38</sup> *Id.*

<sup>39</sup> See *US Lines v. Federal Maritime Commission*, 584 F.2d 519 (D.C. Cir. 1978) (no disclosure of nature of data relied upon for decision; no need to protect proprietary data); *Home Box Office v. FCC*, 567 F.2d 9 (D.C. Cir. 1977) (no disclosure of *ex parte* statements to reviewing court in rulemaking proceeding; no proprietary information); *American Lithotripsy Society v. Sullivan*, 785 F. Supp. 1034 (D.D.C. 1992) (*American Lithotripsy*) (no presentation to public of agency analysis and research that formed basis for reimbursement rate); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973), *cert. denied* 417 U.S.

921 (1974) (*Portland Cement*) (no opportunity to comment on tests conducted by agency). *American Lithotripsy* remanded an agency's decision because the agency had not presented any of its own analysis to the public for comment, and did not provide any opportunity for comment. Similarly, in *Portland Cement*, the court concluded that EPA's failure to release the details of emission tests until after comments were due in the rulemaking was arbitrary and capricious. *American Lithotripsy* and *Portland Cement* are both distinguishable from the ONA investigation because MCI was given an opportunity to examine the SCIS model to the extent possible without compromising proprietary data, and was able to include its analysis in its comments in the investigation.